IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1087-15

LAJUAN CECILE BAILEY, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY**

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

Based on the rationale in the dissenting opinion on en banc reconsideration by Chief Justice Radack of the First Court of Appeals, I respectfully dissent. I agree with her statement that "no competent attorney would employ a trial strategy that calls for eliciting privileged communications over his client's clearly-stated objection on the record." *See Bailey v. State*, 469 S.W.3d 762, 780 (Tex. App.—Houston [1st Dist.] 2015) (op. on rehearing) (Radack, C.J., dissenting). I, therefore, would reverse the judgment of the court

of appeals that affirms the conviction against Lajuan Cecile Bailey, appellant, for felony failure to appear. *See* TEX. PENAL CODE § 38.10.

In this case, the facts show that appellant hired attorney Brian Roberts to defend her for two charges of fraudulent use or possession of identifying information, one in Harris County and one in Jefferson County. Appellant also had a pending criminal charge in Brazoria County. Roberts reset the Harris County case from September 7, 2010 to September 21, and, on September 2, he notified appellant of the new date. But after he notified appellant about the new date, and before her new trial setting, appellant's Harris County bond was revoked for a different reason on September 8. Believing that the revocation of her bond had cancelled the September 21 setting, appellant did not appear for her Harris County case on September 21. At trial, appellant claimed that, on this basis, she had a reasonable excuse for her failure to appear for the court setting on September 21. *See id*. § 38.10(c).

At her trial for failing to appear for the September 21 setting, appellant's trial attorney produced evidence from her former attorney to explain appellant's failure to appear for that setting. Appellant agreed to allow her former attorney's testimony, but only as it pertained to her Brazoria County case. Appellant expressly stated, "I'm only waiving privilege to the one case that was filed against me in Brazoria County." Despite her express statements about the scope of her waiver, trial counsel told her former attorney that "[e]verything has been waived at this point" and not to "worry about the attorney-client" so as to permit testimony about his representation of appellant for the Harris County and Jefferson County cases. After

that, trial counsel produced damaging testimony against appellant by having her former attorney testify that appellant did "not plan on appearing in court at Jefferson County" for the court setting in that case.

This Court's majority opinion appears to hold that appellant could not limit her waiver to only the Brazoria County case so that, when she waived privilege on that case, that waiver was effective as to all her cases. I agree with the dissenting opinion in the court of appeals that the discussions between former counsel and appellant about her Brazoria County case were a separate matter from any discussions about the other cases. The dissenting opinion notes that "the Brazoria case that appellant consented to disclose was highly relevant to the Harris County case because it served as the basis for the September 8 revocation of her bond, and it is the September 8 revocation that led to appellant's 'reasonable belief' argument that she no longer needed to show up in court on September 21." *Bailey*, 469 S.W.3d at 782. The dissenting opinion succinctly explains that appellant "believed that she could not 'jump' a bond that had already been revoked." *Id.* As the dissenting opinion notes, the Jefferson County case was not intertwined with the Harris County case because appellant's bond had not been revoked in the Jefferson County case at the time that appellant's bond was revoked in Harris County. *Id.* The dissenting opinion concludes by stating, "Indeed, by affirmatively introducing evidence that appellant planned not to appear in Jefferson County either, defense counsel injected harmful evidence of character conformity that the State generally would have been unable to present." *Id.* (citing TEX. R. EVID. 404(b)).

Trial counsel's deficient performance prejudiced appellant. Her trial counsel elicited testimony from appellant's former attorney that appellant had told him during the course of his representation that she did "not plan on appearing in court at Jefferson County." Appellant's trial attorney's introduction of this evidence against appellant at her bail jumping trial prejudiced her case by strongly suggesting that she acted with premeditation in planning not to attend a scheduled court appearance and by implicitly showing that her claimed excuse for failing to appear was not genuine.

I adopt the rationale in Chief Justice Radack's dissenting opinion as mine, and her assessment that, "[p]ut simply, if [trial counsel's] trial strategy required waiving a privilege that his client did not want waived, his representation of her was ineffective, especially since it caused the admission of an otherwise inadmissible extraneous offense." *Id.* at 784. I would reverse the judgment of the court of appeals by holding that trial counsel was ineffective, and remand for a new trial. For these reasons, I respectfully dissent.

Filed: December 14, 2016

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